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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JUDY MADSEN, ED MARTIN, and SHIRLEY HOBBS,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., and CENTRAL FLORIDA WOMEN'S HEALTH ORGANIZATION, INC.,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN MEDICAL WOMEN'S ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, AND THE CALIFORNIA MEDICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the First Amendment prohibits state courts from issuing injunctions regulating the time, place and manner of speech-related conduct that has a demonstrably adverse effect on the health and safety of patients at a medical facility and is inimical to the residential privacy interests of health care providers.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICI CURIAE*	1
BACKGROUND	2
1. The Adverse Health and Safety Effects of Protest Activities Outside Abortion Clinics	3
2. Protest Activities Directed at Clinic Staff	9
SUMMARY OF ARGUMENT	12
ARGUMENT	13
I. THE INJUNCTION IS A CONTENT NEUTRAL, VALID TIME, PLACE AND MANNER RESTRICTION ON PETITIONERS' SPEECH	13
A. The Injunction Regulates the Manner, Not the Content, of Petitioners' Speech	14
B. The Injunction Serves Compelling Government Interests	20
C. The Injunction Is Narrowly Tailored to Protect the Government Interests at Stake and Leaves Open Ample Alternative Means of Communication	25
II. THE INJUNCTION IS NOT OVERBROAD	29
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Adderley v. Florida, 385 U.S. 39 (1966) 21
American College of Obstetricians & Gynecologists v. Thornburgh, 613 F. Supp. 656 (E.D. Pa. 1975) 8
Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) 18
Bellotti v. Baird, 443 U.S. 622 (1979) 25
Beth Israel Hosp. v. NLRB, 437 U.S. 483 (1978) 22
Bigelow v. Virginia, 421 U.S. 809 (1975) 22
Boos v. Barry, 485 U.S. 312 (1988) ..... *passim*
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 30
Burson v. Freeman, 112 S. Ct. 1846 (1992) 13, 20, 21, 25, 28
Carey v. Brown, 447 U.S. 455 (1980) 23
City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984) 13, 15
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 16, 17
Cohen v. California, 403 U.S. 15 (1971) 24
Cox v. Louisiana, 379 U.S. 559 (1965) 21
Dallas County Hosp. Dist. v. Dallas Ass'n of Community Orgs. for Reform Now, 459 U.S. 1052 (1982) 22
FCC v. Pacifica Found., 438 U.S. 726 (1978) 24
Forsyth County v. Nationalist Movement, 112 S. Ct. 2395 (1992) 16
Frisby v. Schultz, 487 U.S. 474 (1988) ..... *passim*
Grayned v. City of Rockford, 408 U.S. 104 (1972) 21, 26, 27, 29
Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 13
Kovacs v. Cooper, 336 U.S. 77 (1949) 24, 25, 30
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 21, 22, 24
Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941) 25, 26, 29
NLRB v. Baptist Hosp., Inc., 442 U.S. 773 (1979) 12, 21, 22
New York v. Ferber, 458 U.S. 747 (1982) 30
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) 17

TABLE OF AUTHORITIES—Continued

Page

Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945) 19
Roe v. Wade, 410 U.S. 113 (1973) 22
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 29
Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) 25
Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) 21
United States v. Albertini, 472 U.S. 675 (1985) 13, 25
United States v. Kokinda, 497 U.S. 720 (1990) 21
Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 16
Ward v. Rock Against Racism, 491 U.S. 781 (1989) 16

OTHER AUTHORITIES

Fed. R. Civ. P. 65(d) 19
Adler et al., *Psychologic Factors in Abortion*, Am. Psychologist (Oct. 1992) 6
Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83 (1986) 3, 5
Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985) 2, 5
Cates et al., *Prevention of Uterine Perforation During Curettage Abortion*, 251 JAMA 2108 (1984) 3
Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266 (1977) 3, 5
Forrest & Henshaw, *The Harassment of U.S. Abortion Providers*, 19 Fam. Plann. Persp. 9 (1987) 8
Frankel-Fein, *Defense Style, Social Support Appraisal, Response to a Counseling Session, and Stress Perception in Women Undergoing Abortion* (1991) 6

TABLE OF AUTHORITIES—Continued

	Page
Garfield, *Psychologic Problems in Anesthesia*, 10 Am. Fam. Physician 60 (1974)	7
Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstet. & Gynec. 719 (1992)	11
Halvorson Boyd, *Surviving a Holy War: How Health Care Workers in U.S. Abortion Facilities Are Coping With Antiabortion Harassment* (1990)	11
Handy, *Psychological and Social Aspects of Induced Abortion*, 21 British J. Clin. Psychol. 29 (1982)	7
Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plann. Persp. 246 (1991)	3, 11, 24
Hern, *Abortion Practice* (1984)	9
Hern, *Proxemics: The Application of Theory to Conflict Arising from Antiabortion Demonstrations*, 12 Population & Env't 379 (1991)	8, 9
Kay, *Psychological Preparation for a Potentially Stressful Medical Procedure* (1984)	8
Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. Gynec. 33 (1986)	6, 7
Levine et al., *Failure Hurts: The Effects of Stress Due to Difficult Tasks and Failure Feedback on Pain Report*, 54 Pain 335 (1993)	8
Manyande et al., *Anxiety and Endocrine Responses to Surgery: Paradoxical Effects of Preoperative Relaxation Training*, 54 Psychosomatic Med. 275 (1992)	8
Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688 (1987)	7, 9
Polk-Walker, *Counseling Implications in a Client's Choice of Anesthesia During a First or Repeat Abortion*, 28 Nursing Forum 22 (1993)	6, 9
The Surgeon General's Report: The Public Health Effects of Abortion (1989)	4

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INTEREST OF *AMICI CURIAE*

Amici are national and state organizations of physicians dedicated to promoting the public welfare through the maintenance of the highest professional standards and the provision of quality health care. *Amicus* American College of Obstetricians and Gynecologists (ACOG) is a private, voluntary, nonprofit organization of physicians who specialize in obstetric and gynecologic care. ACOG is the leading group of professionals providing health care to women; its more than 33,000 members represent approximately 90 percent of all obstetricians and gynecologists practicing in the United States. *Amicus* California Medical Association is a nonprofit, incorporated professional association of approximately 32,000 physicians

engaged in the private practice of medicine, in all specialties, in the State of California. *Amicus* American Psychiatric Association, with approximately 40,000 members, is the nation's largest organization of physicians who specialize in psychiatry. *Amicus* American Medical Women's Association is a non-profit organization of 13,000 women physicians and medical students.

Amici have a two-fold interest in this case. First, the injunction at issue in this proceeding regulates conduct that had a demonstrably deleterious effect on the health and welfare of patients at a medical facility; indeed, the enjoined conduct often increased the risks associated with or completely prevented the provision of medical services to patients. Second, *amici* believe that health care providers have a fundamental right to be free in their residences from focused, intimidating and harassing picketing and other forms of coercive protest designed to force them to cease providing legal health care services. Because this case concerns the extent to which courts can regulate conduct that is fundamentally incompatible with patient health and safety and inimical to the privacy interests of health care providers, *amici* wish to present their views.[1]

BACKGROUND

Easily overlooked in the often heated ethical, moral and legal debate surrounding abortion is the fact that it is an invasive medical procedure. When performed correctly by trained and experienced physicians, abortion is relatively safe. Nevertheless, an estimated 5,000 women "suffer a serious complication" from the procedure each year, and "the potential for complications is a major public health concern." Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. 14 (1985). Among the most serious com-

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

plications are infections necessitating hospitalization, hemorrhage requiring transfusion, uterine perforation, bowel or bladder injury, pulmonary embolism, endotoxic shock, convulsions, cardiac arrest and, in rare circumstances, death.[2]

In the United States, approximately two-thirds of all abortions are performed in stand-alone clinics such as the Aware Woman Center.[3] These clinics are licensed medical facilities, staffed by physicians and other trained medical personnel who, in addition to performing or assisting with the abortion procedure itself, administer general and local anesthesia before the operation and analgesics and other necessary medications after the operation. The medical staff also must recognize and respond to any of the major or minor complications that might arise during or after the procedure. In addition, almost all clinics provide other medical services, most typically contraceptive care to nonabortion patients, general gynecologic care and treatment for sexually transmitted diseases.[4]

1. The Adverse Health and Safety Effects of Protest Activities Outside Abortion Clinics

The injunction at issue in this case proscribes activities that increased the medical risks associated with abortions and otherwise adversely affected the health and safety of patients at the clinic. Most significantly, the protests prevented or deterred some patients from entering the clinic

[2] Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 267 n.+ (1977); Cates et al., *Prevention of Uterine Perforation During Curettage Abortion*, 251 JAMA 2108 (1984). The leading causes of abortion mortality are hemorrhage and anesthesia-related deaths, followed by infection and amniotic fluid embolus. Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 90 (1986).

[3] Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plann. Persp. 246 (1991).

[4] *Id.* at 247. Many clinics also provide nongynecologic surgery, obstetric care, general medical care, infertility counseling or treatment, HIV testing and female sterilization. *Id.*

on the day of their appointments, thereby forcing these women to reschedule the procedure for a later date. By delaying abortions, protesters placed some patients at greater risk of suffering the types of serious complications described above.

Protesters marching on the 37-foot sidewalk that connects the clinic's two parking lots frequently blocked access to the clinic, either by standing directly in front of cars or by surrounding cars that attempted to enter the lots.[5] In other instances, patients who saw dozens (and, on some days, hundreds) of shouting protesters in front of the clinic did not even attempt to enter and instead simply drove away.[6] As a consequence, a significant number of women were unable to keep their appointments and were forced to undergo abortions later in their pregnancies.[7] Indeed, preventing or delaying scheduled abortions was one of the express purposes of the protests.[8]

As the clinic's physician, Dr. Snydle, explained to the district court, delaying an abortion makes the procedure more difficult and time consuming, and increases the risk of morbidity and mortality. J.A. at 155. It is widely recognized that "[t]he earlier in gestation that a woman has an abortion, the safer it is for her medically. . . . The risk of the procedure and the potential for complications increase with the length of pregnancy." *The Surgeon General's Report: The Public Health Effects of Abortion* 13 (1989). In fact, within the first 12 weeks of pregnancy, "the main risk to a woman who wants an abortion

[5] *See* J.A. at 146-47, 154, 211, 271, 275, 534-35, 545, 552.

[6] *See* J.A. at 590, 603-04.

[7] *See* J.A. at 590, 603-04.

[8] Literature from one of the protest groups explained that "[b]locking access to the entrance of abortion clinics . . . buys time for our sidewalk counselors to talk with the birth mothers. In most instances the clinic is shut for the day." J.A. at 404. Petitioner Martin acknowledged that one of the means of protest to which he subscribed consisted of blockading access to clinics. *Id.* at 396.

results from delay." Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. 266, 267 (1977). "[A]dvanced gestational age is recognized as a major risk factor for serious complications following abortion" (Buehler et al., *The Risk of Serious Complications from Induced Abortion: Do Personal Characteristics Make a Difference?*, 153 Am. J. Obstet. Gynec. at 14), and is "associated with an increased risk of abortion mortality." Binkin, *Trends in Induced Legal Abortion Morbidity and Mortality*, 13 Clin. Obstet. Gynec. 83, 85 (1986). Indeed, studies indicate "that *any* delay increases the risk of complications." Cates et al., *The Effect of Delay and Method Choice on the Risk of Abortion Morbidity*, 9 Fam. Plann. Persp. at 268 (emphasis in original). Thus, by turning patients away from the clinic, protesters exposed some women to greater medical risks than they otherwise would have faced.

In addition, the protests adversely affected the health and safety of women who managed to enter the clinic. First, both Dr. Snydle and Captain Allgeyer of the Melbourne Police Department testified that, by blocking the clinic's driveways, protesters on the sidewalk could impede the arrival of emergency medical teams or vehicles. J.A. at 155, 259. In the event of the rare emergency, such as a uterine perforation involving large blood loss, a patient's life would depend on the prompt arrival of emergency vehicles. Although no such emergency occurred during the protests at the Aware Woman Clinic, Dr. Snydle testified that protesters outside another Florida clinic had in fact interfered with the arrival of an ambulance. J.A. at 155. From the standpoint of patient health and safety, of course, this threat of interference is wholly intolerable.

Second, the record reveals (and medical literature confirms) that the types of protest activities that the district court enjoined in this case directly affect the emotional state of many patients, which in turn can complicate and increase the risks associated with the procedure itself. On

protest days, patients arriving at the clinic were met by large numbers of shouting and screaming protesters, many of whom, as previously noted, blocked access to the clinic or approached cars in an effort to force literature upon patients and other occupants.[9] Patients who got through the sidewalk and into the parking lot were confronted by protesters standing on ladders who shouted at them over an eight foot fence.[10] The screams of protesters could be heard clearly from across the street, and were audible inside the building, even over music that the clinic played in an effort to suppress the sound of the shouting.[11] Some protesters specifically directed their shouts towards the surgical suites and recovery area within the clinic.[12] In one instance, a protester standing on a ladder held a sign towards the clinic that identified a man who had accompanied a patient inside.[13]

Such activities are physically and emotionally upsetting to many women undergoing an abortion. Coping with the emotional complexities of an unwanted pregnancy is recognized to be a particularly stressful life event.[14] In addition, many women approach abortion, like any other invasive procedure, with trepidation because it "is a medical procedure which may be uncomfortable or painful." Landy, *Abortion Counselling—A New Component of*

[9] *See, e.g.*, J.A. at 146-47, 534 (blocking or surrounding cars); *id.* at 260, 282, 354, 534, 542, 546, 552, 619 (screaming and shouting).

[10] *See* J.A. at 284, 355, 459-62, 542, 553.

[11] *See* J.A. at 260, 282, 534, 546.

[12] *See* J.A. at 551, 553.

[13] *See* J.A. at 355, 538, 542.

[14] Adler et al., *Psychologic Factors In Abortion*, Am. Psychologist (Oct. 1992), at 1194, 1197; Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. Gynec. 33, 36 (1986); Frankel-Fein, *Defense Style, Social Support Appraisal, Response to a Counseling Session, and Stress Perception in Women Undergoing Abortion* 4, 31 (1991); Polk-Walker, *Counseling Implications in a Client's Choice of Anethesia During a First or Repeat Abortion*, 28 Nursing Forum 22 (1993).

Medical Care, 13 Clin. Obstet. Gynec. 33, 38 (1986).[15] Indeed, "most [adult] patients have some degree of state anxiety relating to anesthesia" (Garfield, *Psychologic Problems in Anesthesia*, 10 Am. Fam. Physician 60, 62 (1974)), and even a minor surgical procedure can be "an important problem of emotional stress for many patients." Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Sur. 688, 694 (1987).[16]

For patients already in a state of emotional vulnerability, protests such as those enjoined here can cause extreme distress. On the days protests took place, clinic staff observed that many patients had elevated blood pressure, increased rates of respiration and rapid heartbeats; some women arrived at the clinic in tears, and many appeared to be extremely anxious, fearful or agitated.[17] Many of these patients expressly attributed their distress to the yelling, shouting and harassment outside the clinic; because none had prior histories of hypertension, and because patients who attended the clinic on days without protests did not exhibit such symptoms, the medical staff concluded that the protesters caused these abnormal symptoms.[18] Dr. Snydle testified, moreover, that it was the *manner* of the protests—in particular the yelling and screaming and overt hostility—that, in his medical judgment, accounted for the patients' high levels of anxiety. J.A. at 202-03.

His assessment is corroborated by evidence from other clinics where patients encountering similar protests have

[15] *See also* Handy, *Psychological and Social Aspects of Induced Abortion*, 21 British J. Clin. Psychol. 29, 37 (1982).

[16] This is especially true of teenagers, who lack experience with pelvic examinations and medical procedures generally. Landy, *Abortion Counselling—A New Component of Medical Care*, 13 Clin. Obstet. Gynec. at 38.

[17] *See* J.A. at 147, 150-51, 153, 202-03, 212-13, 264, 585.

[18] *See* J.A. at 150-53, 212-13.

likewise suffered psychophysiological stress. In addition to crying, such patients have "exhibited evidence of adrenergic 'fight-or-flight' reaction such as pallor, shaking, sweating, pupillary dilation, palpitations, hyperventilation, and urinary retention." Hern, *Proxemics: The Application of Theory to Conflict Arising From Antiabortion Demonstrations*, 12 Population & Env't 379, 380 (1991).[19]

These symptoms complicate an abortion and increase its risks. For example, urinary retention makes it difficult or impossible to perform a pelvic examination and determine uterine size or the presence of any co-existing pelvic pathology, both of which are essential in the preoperative evaluation. *Id.* at 380-81. Hyperventilation can lead to uncomfortable sensations, which can heighten anxiety and even lead to loss of consciousness if a vasovagal syndrome occurs. *Id.* Studies of patients that undergo abortions have shown that tension affects the degree of pain experienced and the difficulty of the procedure itself,[20] a finding consistent with other studies of stress and its effects on surgery patients.[21] And if a patient becomes agitated before or during the procedure, "she could easily experience serious complications of the abor-

[19] *See also id.* at 382; *American College of Obstetricians & Gynecologists* v. *Thornburgh*, 613 F. Supp. 656, 663 (E.D. Pa. 1975) (patients who entered clinics during protests "were visibly upset and distressed"); Forrest & Henshaw, *The Harassment of U.S. Abortion Providers*, 19 Fam. Plann. Persp. 9, 13 (1987) (for women who encounter harassing protests, "obtaining an abortion can be a frightening experience").

[20] Kay, *Psychological Preparation for a Potentially Stressful Medical Procedure* 32 (1984) ("high levels of preoperative anxiety in abortion patients are associated with greater pain and discomfort during the abortion procedure, when compared with moderate levels of anxiety").

[21] Levine et al., *Failure Hurts: The Effects of Stress Due to Difficult Tasks and Failure Feedback on Pain Report*, 54 Pain 335, 336 (1993); Manyande et al., *Anxiety and Endocrine Responses to Surgery: Paradoxical Effects of Preoperative Relaxation Training*, 54 Psychosomatic Med. 275, 283 (1992).

tion that would be extremely unlikely under other circumstances." *Id.* at 381.

Consistent with these medical findings, Dr. Snydle testified that patients exhibiting signs of heightened anxiety showed more resistance to analgesics and required higher levels of sedation. J.A. at 153.[22] Increasing the level of sedation in turn increases the risk of the surgery. *Id.*[23] Indeed, Dr. Snydle testified that on several occasions a patient's anxiety-related symptoms were so great that it was necessary to postpone surgery. J.A. at 150-51. A patient whose surgery is deferred, of course, later faces increased risks due to the advanced gestational point at which abortion is perfomed. See *supra* pp. 3-5.

2. Protest Activities Directed at Clinic Staff

The protesters' activities were directed not only at patients but also at the health care providers at the clinic. Protesters blocked Dr. Syndle's car as he tried to enter the clinic and shouted at him over the eight foot fence surrounding the parking lot. J.A. at 146, 454, 460. Another employee, Ruth Arick, testified that protesters shouted over the fence at her that they were praying for her death. J.A. at 555-56.

In addition, protesters conducted demonstrations outside the homes of the clinic's medical staff and owners. Groups of as many as 30 protesters marched in front residences carrying signs and distributing leaflets that

[22] *See also* Polk-Walker, *Counseling Implications in a Client's Choice of Anesthesia During a First or Repeat Abortion*, 28 Nursing Forum 22, 23 (1993) (women who are anxious or fearful choose general anesthesia more frequently than calmer women).

[23] *See* Hern, *Abortion Practice* 35-37 (1984) (general anesthesia is associated with a two to four-fold increase in first-trimester abortion fatalities, and significant increases in uterine perforation, cervical injury, blood transfusions and corrective major surgery); Meyer, *Haemodynamic Changes Under Emotional Stress Following a Minor Surgical Procedure Under Local Anaesthesia*, 16 Int'l J. Oral Maxillofac. Surg. 688 (1987) (noting that, in cases of "[u]nexplained cardiovascular reactions and fatalities" associated with local anaesthesia, "[i]mportant factors are fear, anxiety and stress").

identified clinic employes as murderers (J.A. at 170, 458, 493), shouting at other residents and passing cars (J.A. at 501-02), and knocking on the doors of the homes or apartments. J.A. at 458, 506-07, 512. In one case, 15 protesters approached the residence of Pam Doyle, a clinic nurse, while she was working and her three daughters, ages 15, 11 and nine, were home alone. J.A. at 505-07. The protesters asked the girls to convince their mother to "stop killing babies." J.A. at 507. Not surprisingly, the encounter terrified the children. J.A. at 505-07.

Ms. Doyle testified that she felt trapped in her home during the protests and that she feared for the safety of her children on days when she was at work while they were at home. J.A. at 503-04. She was so upset by the invasion of her privacy that she moved. J.A. at 514. She also ceased working at the clinic for a time. J.A. at 521.

Her reactions to the protests—both those at her home and those at the clinic—were typical of other clinic employees. Dr. Snydle testified that he was frightened and disgusted by the acts of a large group of protesters who accosted him at a hotel where he had spent the night, and by the act of a lone protester who trailed him on the highway and pulled alongside his car to pantomime the act of shooting him. J.A. at 174-79, 190-91.[24] Ruth Arick testified that she felt threatened by protesters' shouts, J.A. at 555-56, and both she and Dr. Snydle testified that they feared the possibility of assassination by a protester swept up in the fervor of the demonstrations. J.A. at 196-99, 599. All three clinic employees who testified, however, stated that they were not frightened by, and did not object to, peaceful picketing and praying outside the clinic.[25]

[24] In addition, Dr. Snydle received threatening mail at his home and was accosted at the clinic itself. J.A. at 170, 185-86.

[25] *See* J.A. at 215 (Dr. Snydle) ("It's when they antagonize and harass and intimidate and cause severe harm to innocent individuals that I object"); *id.* at 517-18 (Pam Doyle) ("Marching and yelling and name calling scares me. . . . The praying doesn't scare me"); *id.* at 596-97 (Ruth Arick) (praying and singing "are not the threatening, menacing activities that the clinics are concerned with . . . . We're concerned about obstruction, about people blocking ingress and egress, . . . and people being threatened, harassed, and intimidated").

A 1988 study found that the "continued harassment of abortion providers and their patients is a problem that no other medical care providers encounter." Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plann. Persp. 246, 252 (1991). Studies of clinic personnel have found that employee levels of distress are highly correlated with protest activities at the clinics, with the highest levels of distress typically being reported by those who work at clinics experiencing the most protest activities.[26] Indeed, even health care providers who have not suffered direct attack experience heightened fear when other providers are attacked, and are thus primed to take seriously any implied or overt threats directed at them.[27]

The present case graphically illustrates these effects. Employees such as Ms. Doyle and her children are made to feel trapped and frightened in their own homes, and are forced to relocate, simply because they provide legal medical services. Others are forced to stop providing such services altogether, as was Dr. Snydle, who ceased practicing at the clinic following the murder of a physician outside another Florida clinic. J.A. at 196. These adverse effects on health care providers cannot help but ultimately have a negative effect on patient welfare. In addition to driving experienced physicians such as Dr. Snydle out of the practice, harassment and intimidation discourage younger physicians from entering the field, thereby reducing the availability of abortion services. Grimes, *Clinicians Who Provide Abortions: The Thinning Ranks*, 80 Obstet. & Gynec. 719, 721 (1992).

[26] Halvorson Boyd, *Surviving a Holy War: How Health Care Workers in U.S. Abortion Facilities Are Coping With Antiabortion Harassment* at 72.

[27] *Id.* at 57-58.

SUMMARY OF ARGUMENT

The amended injunction is a content-neutral, reasonable time, place and manner restriction on expressive activity that interferes with the operation of a medical facility.

1. The injunction regulates the manner, not the content, of petitioners' speech. On its face, the injunction does not proscribe any message or idea, nor does it regulate the content of any communication by petitioners. Rather, it extends only to the manner in which petitioners may protest outside of the clinic and the homes of the clinic's employees and owners. Petitioners have chosen methods of communicating their message that are fundamentally incompatible with the nature of a medical facility and private residences. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 791 (1979) (Burger, C.J., concurring in judgment); *Frisby v. Schultz*, 487 U.S. 474 (1988). Having engaged in conduct inimical to patient health and safety and residential tranquility, petitioners cannot point to their own message as evidence that the necessary regulation of their conduct is content-based. Further, petitioners' argument that the injunction prohibits expressive activity based on the listener's reaction to the content of the speech ignores uncontradicted evidence in the record that listeners were harmed by the *manner* of petitioners' speech, not its message.

2. The injunction serves a substantial, indeed compelling, government interest in restricting conduct that has a demonstrably harmful effect on the health and welfare of patients at a medical facility. Moreover, by preventing harassing picketing designed to force health service professionals to stop providing legal health care services, the injunction directly promotes vital interests.

3. The nature of the forum and the fact that petitioners' activity is targeted at a captive audience confirm that the injunction serves a compelling government interest. The character of a medical facility raises public health and safety concerns that match or exceed the interests implicated in other contexts—such as those involving schools, courthouses, and public busses—in which this Court has upheld restrictions not only on the manner, but in some cases the content, of speech. Similarly, the captive nature of the audience means that offensive or harmful speech-related conduct may be regulated, inasmuch as patients and doctors are "practically helpless" to avoid petitioners' interference with their substantial health and privacy interests.

4. The injunction is sufficiently tailored to address specific instances of conduct that have had demonstrable adverse consequences on clinic patients and staff. It does not prohibit more conduct than necessary, but rather applies only to identifiable, well-documented abuses that have occurred at the clinic and the homes of clinic personnel. For these same reasons, the injunction is not impermissibly overbroad.

ARGUMENT

I. THE INJUNCTION IS A CONTENT NEUTRAL, VALID TIME, PLACE AND MANNER RESTRICTION ON PETITIONERS' SPEECH.

The First Amendment reflects a national commitment to uninhibited, robust and wide open debate. *Boos v. Barry*, 485 U.S. 312, 318 (1988). It does not, however, guarantee the right to communicate one's views at all times and places or in any manner. *Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The government may regulate the time, place and manner of expressive conduct or speech when it does so on a content-neutral basis and by restrictions that are adequately tailored to serve a significant government interest and that leave open ample alternative means of communication. *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992); *United States v. Albertini*, 472 U.S. 675, 689 (1985). The injunction at issue in this case is an appropriate, time, place and manner restriction that bal-

ances the free speech interests of extraordinarily hostile abortion protesters against the health and safety interests of patients at a medical facility and the privacy interests of medical personnel in their homes. Moreover, even if the injunction were content-based—and it plainly is not—the injunction would still be constitutionally permissible in light of the compelling governmental health, safety and privacy interests it serves and its narrowly drawn prohibitions.

A. The Injunction Regulates the Manner, Not the Content, of Petitioners' Speech.

On its face, the injunction does not proscribe any message or idea, nor does it regulate the content of any communication around the clinic or the residences of the clinic's staff. To the contrary, the injunction regulates, and in some areas proscribes, *conduct* or *acts*, such as shouting, singing, chanting, whistling, yelling or using sound amplification devices during surgical procedures (J.A. at 59), or physically abusing, grabbing, intimidating, or harassing persons entering or leaving the clinic. *Id.*; see also J.A. at 60 (referring to "prohibited *acts* listed herein") (emphasis added). Each of the injunction's prohibitions is based on factual findings that the proscribed conduct interfered with or increased the medical risks of procedures performed at the clinic, or improperly invaded the privacy interests of clinic staff in their residences.

Thus, for example, the 36-foot buffer zone around the clinic (Paragraphs One through Three of the injunction) ensures that patients, who, despite an earlier injunction, had been prevented or deterred from entering the clinic by congregations of protesters (see *supra* pp. 3-4), are able to keep scheduled appointments. Accordingly, this buffer zone ensures that women who obtain abortions will do so at an earlier (and safer) stage of their pregnancies. Paragraph Four shields patients *inside* the clinic from noises and signs that in the past upset them or made them anxious, thereby increasing the medical risks of their

surgeries. See *supra* p. 6. Paragraphs Five and Seven protect women entering or leaving the clinic from physical contact with, or uncomfortably close proximity to, protesters whose frequently aggressive and hostile shouting had, in many cases, had a demonstrably adverse effect on the health and safety of patients. See *supra* p. 7. Paragraph Five's 300-foot buffer zone likewise prevents protesters from shadowing or stalking p. ents—an activity plainly at odds with the well-being of patients.

Similarly, Paragraphs Six and Eight prohibit the targeted picketing of the homes of employees of the clinic,[28] and the harassment, intimidation, physical abuse, assault and threatening of clinic staff.[29] Ample evidence revealed that these protest activities have driven health care providers, such as Dr. Snydle, from the field, may discourage new physicians from entering the field, and are inimical to the privacy interest that physicians and nurses, like all citizens, enjoy within their own homes.[30] See *infra* p. 11; see also *Frisby v. Schultz*, 487 U.S. 474 (1988).

Notwithstanding the detailed findings of the district court, petitioners claim that the injunction is content-based because it applies to Operation Rescue and petitioners, pro-life advocates, and "all persons acting in concert or participation with them." This crabbed argument: (i) wholly fails to address the actual content-neutral language of the injunction; (ii) does no more than restate the fact that an injunction rather than an ordinance is the subject of this proceeding; and (iii) trivializes the profound adverse medical consequences of petitioners' conduct.

Common sense dictates that the starting point for determining whether a restriction is content-based is the language of the restriction itself. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). A

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[28] *See* J.A. at 59.

[29] *See* J.A. at 60.

[30] *See* J.A. at 56.

restriction that "singles out speech of a particular content," *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976), or that requires for its application an "examin[ation of] the content of the message that is conveyed," *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992), is content-based. As described above, however, the injunction at issue here regulates the *manner* in which petitioners may communicate their views. It does not prohibit any message or limit only "pro-life" expressive conduct by petitioners. Instead, the injunction limits all expressive conduct that the district court properly found to have adverse medical consequences on the patients of the clinic. The fact that the organizations and individuals who have engaged in conduct that is fundamentally incompatible with the purpose of a medical facility happen to advocate a particular point of view about abortion does not, by itself, transform necessary and content-neutral prohibitions on conduct into content-based discrimination against speech.

Not only is the injunction facially content-neutral, it is unquestionably justified by a legitimate governmental interest rather than disagreement with the content of the regulated speech. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), and cases cited therein. As this Court has explained

> The principle inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on *some speakers or messages* but not others.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (emphasis supplied) (citation omitted).

It is clear that the injunction was created to serve the legitimate—indeed compelling—interests in (1) securing

safe and effective medical care for patients undergoing a surgical procedure and (2) maintaining residential privacy. The district court based each of the restrictions on findings, which were amply supported by the record, that the interference with access to the clinic, the noises associated with the demonstrations and the uninvited contacts, shadowing and stalking by protesters impermissibly interfered with the operations of the clinic and the physical and emotional well-being of its patients.[31] There is absolutely no basis for suggesting that these well-documented —and medically sound—findings were pretextual or that the district court believed the protesters' speech should be censured. See J.A. at 56 ("The rights of the [protesters] to demonstrate, speak and make known their views should be recognized and protected").

In contending otherwise, petitioners seize upon the "in concert" language typically present in any injunction and argue that, as a consequence of this limitation, the injunction is content-based. Pet. Br. at 11-13. This argument proves too much. The "in concert" language merely reflects (i) the limits of the district court's jurisdiction and (ii) the fact that it was the parties before the court (and persons acting in concert with them) who were the source of the substantive evils that the court properly sought to regulate. An injunction is not content-based simply because the persons who have caused the health and safety concerns necessitating the injunction in the first place all advocate the same point of view and act to promote that goal. *Cf. Clark v. Community for Creative Non-Violence*, 468 U.S. at 297; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49-50 n.9 (1983).

Taking petitioners' argument to its logical conclusion, moreover, would require that any injunction touching on speech or expressive conduct, however indirectly, must satisfy a stricter standard of review than an identical law of general application, despite the fact that a law of

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[31] *See* J.A. at 55-56.

general application presents a concomitantly broader danger of chilling protected speech.[32] The intent to convey a pro-life message is not a necessary element of a violation of the injunction; nor does one violate the injunction by conveying the most strident views on abortion, as long as the message is conveyed in a manner that does not contravene the terms of the injunction. *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2464 (1991) (Scalia, J., concurring in judgment). Indeed, under the injunction, a protester standing outside the 36-foot buffer zone can hold a sign visible to those driving up to the clinic that contains any message, no matter how provocative or graphic, expressing his or her views about abortion.

Petitioners also argue that the injunction is content-based because it is necessary, they claim, to examine the content of an "image observable" inside the clinic in order to determine if the bearer of the image is acting "in concert" with Operation Rescue. Petitioners do not explain why the "in concert" determination is any different when applied to this one element of Paragraph

[32] Indeed, petitioners' theory would lead to absurd results. For example, in *Frisby v. Schultz*, 487 U.S. 474 (1988), this Court upheld an ordinance banning picketing targeted at individual residences. The ordinance was passed in direct response to picketing by pro-life protesters that had generated numerous complaints. *Id.* at 476. Under petitioners' theory, if a court were to enjoin those same picketers to prevent imminent violations of the ordinance, it would have to satisfy a stricter standard of review. This would be true even if the injunction merely recited the terms of the statute and enjoined only individuals who had made clear their intent to violate it. In effect, petitioners' theory would create a system where a statute that is content-neutral is transformed into a content-based restriction merely upon enforcement.

Similarly, in *Boos v. Barry*, 485 U.S. 312 (1988), this Court held that a statute prohibiting congregating within 500 feet of an embassy was a valid time, place and manner restriction on protected speech. *Id.* at 331-32. The statute in *Boos* contains striking similarities to the injunction at issue here, including the use of a "buffer zone" and a site-specific ban on expressive conduct. Under petitioners' theory, the mere use of an injunction to prevent imminent violations of the anti-congregation statute would immediately transform it into a content-based regulation.

Four of the injunction than when applied to any other provision. In fact, petitioners' necessary concession that persons who block access to the clinic (in violation of Paragraphs One and Two) can properly be presumed to be acting in concert with the named defendants (Pet. Br. at 27) is equally applicable to this prohibition. Indeed, it is perfectly logical to assume that a person who brings a ladder to the clinic and stands atop it waving a sign (which is the only way signs can be seen over the clinic's eight-foot fence) is acting in concert with the named defendants to disrupt the clinic's operations.[33]

Precisely because the injunction regulates or prohibits such overt and generally hostile *conduct* (*e.g.*, yelling, shouting, grabbing, intimidating), there is simply no merit to petitioners' related contention that the injunction is content-based because it permits police to enforce the injunction against individuals unconnected with Operation Rescue based solely on the fact that such individuals advocate a similar point of view. As petitioners' own concession makes clear, it is exceedingly unlikely that persons engaging in the proscribed overt and hostile conduct outside the clinic are not acting in concert with the named defendants.[34] In all events, however, it is clear that the injunction can have no effect on individuals, including persons with pro-life views, who are not engaged in active participation with Operation Rescue and petitioners and who have not received actual notice of the injunction. See *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). Indeed, Fed. R. Civ. P. 65(d) itself establishes the proper scope of the injunction: "Every order grant-

[33] There is simply no support in the record for petitioners' claim that the same methods of expression, with similarly adverse effects on patient health and safety, would not or could not be enjoined if these methods were used in support of a different point of view.

[34] Petitioners assert that individuals outside of the scope of Rule 65(d) were arrested for violating the injunction. To the extent Jane Doe #6 or Mr. Quintero claimed not to be acting "in concert," credibility determinations are the proper function of the trial court.

ing an injunction . . . is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order. . . ." Florida Rule of Civil Procedure 1.160(c) mirrors the federal rule.

Finally, petitioners assert that the injunction is content-based because it prohibits certain expressive activity based upon the listener's reaction to the content of the speech. This argument simply ignores the record in this case, which is replete with evidence that listeners were emotionally and physically upset by the loud, threatening, hostile and intimidating *manner* of speech. See, *e.g.*, J.A. at 153 (testimony of Dr. Snydle) ("I believe that [the physical symptoms of anxiety exist] because of the protesters around the clinic yelling and screaming"). The injunction is thus no more based on the reaction of listeners to the protesters' *message* than was the statute at issue in *Frisby v. Schultz*, which this Court upheld as a content-neutral restriction despite the fact that the ban on peaceful picketing of targeted residences had been enacted as a direct result of complaints about actions by pro-life advocates. 487 U.S. at 482.

B. The Injunction Serves Compelling Government Interests.

Content-neutral time, place and manner restrictions, such as those involved here, must serve a significant government interest. *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992). Even content-based restrictions, however, are permissible if they serve a compelling government interest and they are narrowly drawn to achieve that end. *Boos v. Barry*, 485 U.S. 312, 321 (1988). Although the latter restrictions are subject to a higher standard of scrutiny than content-neutral restrictions, in both cases this Court examines the justification for the regulation and the fit between that justification and scope of the regulation. Compare *Burson v. Freeman*, 112 S. Ct. at 1855-57, with *Frisby v. Schultz*, 487 U.S. 474, 484-88 (1988). *Amici* submit that, regardless of which standard of scru-

tiny is applied here, the amended injunction passes constituitonal muster. The injunction plainly serves compelling government interests in ensuring the safe and effective provision of medical treatment and preserving the residential privacy rights of health care providers, and the injunction is carefully tailored to prevent concrete, well-documented threats to those interests.

First, this Court has repeatedly focused on the nature of the forum at or near which expressive activity is taking place when evaluating the constitutional propriety of speech-related regulations. See *United States v. Kokinda*, 497 U.S. 720, 732 (1990) (post office); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-03 (1974) (public bus); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (school); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969) (school); *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (jail); *Cox v. Louisiana*, 379 U.S. 559, 562 (1965) (courthouse). "The nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable.' . . . The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." *Grayned*, 408 U.S. at 116 (quoting Wright, *The Constitution on the Campus*, 22 Vand. L. Rev. 1027, 1042 (1969)). That the activities in question are conducted in the traditional public forum of a public sidewalk is by no means dispositive.[35]

Amici submit that the nature of a medical facility raises public health and safety concerns that match or exceed the interests implicated in the public school, military base, courthouse, or public bus settings. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. 773, 781-85 (1979);

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[35] This Court has upheld restrictions on expressive conduct on sidewalks that is incompatible with the normal activity of a particular place adjacent to the sidewalk. *See Frisby*, 487 U.S. at 480-81; *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992); *Grayned v. City of Rockford*, 408 U.S. 104, 115-17 (1972).

Beth Israel Hosp. v. NLRB, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring in judgment); *Dallas County Hosp. Dist. v. Dallas Ass'n of Community Orgs. for Reform Now*, 459 U.S. 1052 (1982) (Rehnquist, C.J., dissenting from denial of certiorari). Conduct that interferes with the safe and effective provision of medical services is fundamentally incompatible with the nature and function of a medical facility. See *NLRB v. Baptist Hosp., Inc.*, 442 U.S. at 791 (Burger, C.J., concurring in judgment) ("I would think no 'evidence' is needed to establish the proposition that the primary mission of every hospital is care and concern for the patients and that anything which tends to interfere with that objective cannot be tolerated"). Plainly, the government has a compelling interest in seeing that any medical procedure is performed under circumstances that insure maximum safety for the patient, including abortions. *Roe v. Wade*, 410 U.S. 113, 150 (1973). Restricting the time, place or manner of speech-related activity to prevent harmful interference with medical procedures directly serves that very compelling government interest. See *Bigelow v. Virginia*, 421 U.S. 809, 827 (1975). Indeed, this Court has indicated that restrictions on *speech* are appropriate in the hospital setting:

> [T]he [] decision to limit car card space to innocuous and less controversial commercial and service oriented advertising does not rise to the dignity of a First Amendment violation. Were we to hold to the contrary, display cases in public hospitals . . . would immediately become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require.

Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974); see also *Dallas County Hosp. Dist. v. Dallas Ass'n of Community Orgs. for Reform Now*, 459 U.S. 1052 (1982) (Rehnquist, C.J., dissenting from denial of certiorari).

Contrary to petitioners' assertion, the compelling government interests at stake here extend far beyond that of ensuring that women are not "actually prevented from obtaining abortions." Pet. Br. at 17. The injunction prevents the increased medical risks and complications to which petitioners' conduct gave rise, and protects the safe and effective provision of all other obstetric or gynecological services offered at the clinic. Petitioners nowhere address the tangible adverse medical impacts of their actions, including the psychophysiological symptoms of distress that those actions caused in patients. Instead they characterize this case as presenting a tension between an infringement of their right to engage in speech-related activity and a potential infringement of a woman's right to obtain an abortion. Pet. Br. at 16-17. In so doing, they blind themselves to the constitutional issue actually posed by their harmful actions.

Furthermore, the injunction serves a compelling government interest in protecting residential privacy. The record reflects that protesters, among other things, approached the homes of staff and made threatening comments to unattended children of clinic employees. See *supra* p. 10. "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). "There is simply no right to force speech into the home of an unwilling listener." *Frisby*, 487 U.S. at 485. Indeed, speech targeted at the home and designed to coerce rather than to disseminate a message to the general public is an "evil" that is subject to restriction. See *id.* at 487.

Second, the compelling nature of the government interest is revealed by the captive nature of the audience involved. While ordinarily, speech or conduct will not be restricted because it is offensive to the listener, when those listeners are a captive audience, reasonable restrictions on the place and manner of offensive or coercive speech is appropriate. Thus, in *Lehman v. City of Shaker*

Heights, a *content-based* ban on political advertising in the public transit system was upheld because:

> "[t]he streetcar audience is a captive audience. It is there as a matter of necessity, not of choice." *Public Utilities Comm. v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting) In such situations, "[the] legislature may recognize degrees of evil and adapt its legislation accordingly." *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932).

418 U.S. at 302. Bans on targeted picketing and the use of sound trucks in residential neighborhoods and on indecent language over the radio waves have been upheld based upon the effect on the listener. *Frisby*, 487 U.S. at 484-85; *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949). In all of these cases, bans on offensive conduct and even speech were permitted because the means of communication and the content of the speech itself invaded substantial privacy interests in an essentially intolerable manner. See *Cohen v. California*, 403 U.S. 15, 21 (1971).

Individuals seeking medical attention are a classic captive audience. An individual seeking or requiring care at a medical facility that provides reproductive health services, whether an abortion or any other service, is "practically helpless to escape th[e] interference with his [or her] privacy," *Kovacs*, 336 U.S. at 87, that results from conduct such as petitioners'.[36] In addition to being captive, persons seeking medical care, particularly medical care relating to reproductive matters, have a compelling interest in privacy and anonymity.[37] Such captive

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[36] This is particularly true in the case of abortion, which is not a widely offered procedure. Henshaw, *The Accessibility of Abortion Services in the United States*, 23 Fam. Plann. Persp. 246, 252 (1991). Indeed, nearly ten percent of women who obtain abortions must travel more than 100 miles to do so. *Id.*

[37] The record indicates that the injunction responded, in part, to activities of protesters who traced patients' license plates in order to contact them after treatment or "stalked" clinic patients and staff. *See* J.A. at 55, 170, 458, 493, 501-12. *Cf. Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) (invalidating reporting requirements because they "raise[d] the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy"); *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) ("[i]t is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties") (Stevens, J., concurring in judgment).

patients cannot simply avert their eyes, close their ears, or avoid needed medical services altogether in order to avoid the documented adverse medical consequences and invasion of medical privacy that conduct such as petitioners' causes. When expressive conduct crosses the line from being offensive to being harmful to persons helpless to avoid it, injunctive relief is constitutionally permissible. *See id.; Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 293 (1941).

C. The Injunction Is Narrowly Tailored to Protect the Government Interests at Stake and Leaves Open Ample Alternative Means of Communication.

Content-neutral time, place and manner restrictions, such as the injunction at issue here, must be reasonably tailored to serve a significant governmental interest. *Burson v. Freeman*, 112 S. Ct. 1846, 1850 (1992).[38] Content-based restrictions must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end. *Id.* at 1851. *Amici* believe that the amended injunction satisfies both standards.

The injunction at issue here replaced a more limited injunction that prohibited only blocking entry into the clinic and the physical abuse of individuals seeking care

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[38] The requirement that time, place and manner restrictions be narrowly tailored is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

at the clinic.[39] When the original injunction failed to prevent interference with the operation of the clinic, the district court carefully and precisely expanded the injunction. Given this procedural history, petitioners' assertion that the original injunction is a more appropriate, narrowly tailored restriction is entirely untenable. Rather, the first injunction's failure to protect patient health and safety and residential privacy demonstrates that the proposed alternative did not achieve the State's goal.

Each provision of the amended injunction is tailored to permit the clinic to function safely and effectively while allowing petitioners alternative avenues of expression. Under Paragraph Three's buffer zone,[40] petitioners are permitted within 5 feet of the clinic on the east property line and may "congregate, demonstrate and freely express themselves outside the Clinic buffer zone subject to the noise limitations on the days of surgical procedures."[41] Creating a site-specific limited ban on expressive activity demonstrates that the restriction is narrowly tailored. See *Boos v. Barry*, 485 U.S. 312, 331 (1988) (site-specific prohibition of congregating within 500 feet of a foreign embassy upheld); *Grayned*, 408 U.S. at 120 ("expressive conduct may be constitutionally protected at other places or other times, but next to a school, while classes are in session, it may be prohibited"); *Milk Wagon Drivers Union*, 312 U.S. at 298 ("The injunction is confined to conduct near stores dealing in respondent's milk . . . . An injunction so adjusted to a particular situation is in accord with the settled practice of equity").

Paragraph Four prohibits "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic."[42] The provision applies, however, *only* during the hours of surgical procedures and recovery periods. This time limitation and the requirement that noises and images be audible or visible *inside* the clinic further demonstrate that this provision is narrowly tailored to address specific, well-documented "interfere[nce] with the operation of the Clinic and the well-being of its patients,"[43] and thus that it does not prohibit more speech-related activity than is necessary to prevent the interference. *Cf. Grayned*, 408 U.S. at 120.[44]

The 300-foot zone in which clinic patients may avoid "sidewalk counseling," found in Paragraph Five, also is narrowly tailored to address a specific harm. As the record reflects, "sidewalk counseling" all too often consisted of confronting patients, shouting and screaming at them, and attempting to force literature on them.[45] The 300-foot buffer zone is a site-specific response to the well-documented adverse medical effects of this behavior. See *Boos v. Barry*, 485 U.S. at 331. It is narrowly tailored

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[39] *See* J.A. at 9.

[40] Petitioners themselves concede that Paragraphs One and Two of the injunction are appropriately tailored. *See* Pet. Br. at 19.

[41] *See* J.A. at 57-58, 62.

[42] *See* J.A. at 59.

[43] *See* J.A. at 55; *see also* J.A. at 150-53, 212-13.

[44] Petitioners assert that various words or phrases, including "in concert," "intimidating," and "sounds or images observable to or within earshot of the patients inside the Clinic" are impermissibly vague. Pet. Br. at 31-37. But the injunction is tailored to address specific, readily-identifiable types of abusive and coercive conduct. Protesters who scale fences to shout at surgical suites and recovery rooms or to scream at clinic patients in a parking lot, or who shout loudly enough to be heard inside a building from across a public street, can hardly claim to lack notice concerning the types of conduct that the injunction proscribes. "It will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Grayned*, 408 U.S. at 112 n.15 (quoting *American Communication Assn. v. Douds*, 339 U.S. 382, 412 (1950). The district court's detailed factual findings demonstrate, however, that petitioners' conduct raises no such legal niceties.

[45] *See infra* p. 7.

both to permit patients to enter and leave the clinic free of unwanted confrontation and to minimize the prospects that patients will be trailed after they leave the clinic. See *Burson v. Freeman*, 112 S. Ct. 1846, 1857 (1992) (whether or not a smaller "buffer zone" could be created does not present a question of constitutional dimension; rather it represents a difference in degree only, not a less restrictive alternative in kind). Furthermore, protesters are free to speak with patients that approach them first. Similarly, Paragraph Seven, which forbids "physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting" clinic patients and employees is carefully tailored to prevent adverse reactions in patients and health care providers.

Paragraph Six of the injunction creates a 300-foot buffer zone around the homes of clinic employees. The buffer zone is a narrowly tailored response to an "especially offensive" invasion of privacy (*Frisby*, 487 U.S. at 486) that protects residential tranquility while permitting protesters to disseminate their views in residential areas.[46]

Each element of the injunction is carefully crafted to address a specific evil and no more. No acts that may be peaceful in isolation are prohibited unless they have coercive effects in conjunction with other activities. No individuals were enjoined that were not participants in Operation Rescue or in active concert with it. Petitioners' assertion that Paragraphs Three through Nine of the injunction regulate in a manner that does not advance legitimate state goals, defined by petitioners as limited to securing entrance to a clinic (Pet. Br. at 23), is belied by the record.

Moreover, the injunction permits ample alternative methods by which petitioners can disseminate their message to both the public at large and to individuals seeking care from the covered facilities. First, petitioners are not prohibited from remaining on the shoulder of U.S. 1,

[46] *See infra* pp. 12-13.

five feet from the east boundary of the clinic, or beyond 36 feet of the property lines of the clinic. They can picket and conduct peaceful protests or leafletting from these areas to anyone not trying to secure service from the clinic, or from clinic patients that approach them first. Thus, petitioners are not clearly enjoined from all pro-life advocacy within the buffer zones established by the injunction.

Second, petitioners are free to conduct any expressive activity they desire, whenever they wish, and wherever they wish, outside of the spatial boundaries established in the injunction. As in the school setting, where "expressive conduct may be constitutionally protected at other places or other times, but next to a school, while classes are in session, it may be prohibited," *Grayned*, 408 U.S. at 120, expressive conduct next to a medical facility that interferes with the provision of medical services and impairs the health of patients should be restricted.[47]

II. THE INJUNCTION IS NOT OVERBROAD.

Petitioners argue that the injunction is overbroad because it applies to those acting in concert with Operation Rescue and because it prohibits more conduct than "necessary." In effect, petitioners merely restate their assertion that the injunction is not narrowly tailored. If the "in concert" language present in any injunction were sufficient to create an overbreadth problem, every injunction would fall when confronted with a facial challenge. This obviously is not the law. See *Milk Wagon Drivers Union*, 312 U.S. 287. In fact, by issuing an injunction only against named individuals and those in active concert with them, the district court *narrowed* the reach of the restriction, and lessened the danger of chilling unobjec-

[47] Petitioners assert that the injunction is an invalid prior restraint on speech. This argument ignores the fact that the injuncion is a time, place and manner restriction on activities which interfere with the operations of the clinic. Time, place and manner restrictions are excepted from the rules governing prior restraints. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

tionable expressive conduct. See *New York v. Ferber*, 458 U.S. 747, 772 (1982).

Similarly unpersuasive is petitioners' contention that the injunction prohibits more conduct than necessary. Neighboring property owners who are not acting in concert with Operation Rescue may act as they please. See Pet. Br. at 28. Petitioners' contention that innocent, pro-life persons in their own homes or across town will be held in contempt for violating the injunction is purely fanciful. The injunction does not reach pro-life literature, signs, or posters carried by or kept in the homes of individuals (Pet. Br. at 28) because these items are incapable of being perceived through the eight-foot fence surrounding the clinic and the clinic walls.

Those enjoined have chosen particular means of communication, for instance, physically blocking entrances and parking lots, using invasive and coercive techniques when face to face with clinic patients, using sound to interfere with operations inside the clinic, and jamming phone lines. None of this conduct bears "a necessary relationship to speech." *Kovacs v. Cooper*, 336 U.S. at 88 & n.13. Tailored as the injunction is to prevent particular tactics that have adverse medical consequences, the injunction's sweep is constitutionally permissible. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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